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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **FOR THE COUNTY OF RIVERSIDE**

13 **PALM SPRINGS BRANCH**

14 JOHN VILLANI, an individual,

15 Plaintiff,

16 vs.

17 PALM SPRINGS UNIFIED SCHOOL
DISTRICT, a public entity, and DOES
1-5, Inclusive,

18 Defendants.

Case No.: PSC 1606072

**OPPOSITION TO DEFENDANT'S
MOTION FOR PRE-TRIAL
PUBLICITY ORDER PROHIBITING
PLAINTIFF AND PLAINTIFF'S
COUNSEL FROM MAKING PUBLIC
EXTRAJUDICIAL STATEMENTS
REGARDING THE CASE AND/OR
ORDER THAT THE CASE BE TRIED
ELSEWHERE IN RIVERSIDE
COUNTY AND DECLARATION OF
ERIN M. KELLY IN SUPPORT
THEREOF**

Date: August 15, 2019

Time: 8:30 a.m.

Dept.: PS2

Reservation No.: RES92910

Complaint Filed: November 29, 2016

Retrial: September 6, 2019

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	BACKGROUND.....	2
III.	LEGAL ARGUMENT	3
A.	The Court Must Deny Defendant’s Request for an Unconstitutional Prior Restraint.	4
1.	The Speech Poses No Clear and Present Danger or Serious and Imminent Threat to a Fair Trial.....	5
2.	Defendant’s Blanket Request to Prevent “Prejudicial, Inflammatory Statements” to the Public and the Press is Unconstitutionally Vague and Overbroad.....	8
3.	There Are Plenty of Less Restrictive Means of Protecting the Right to a Fair Trial That Do Not Impede on First Amendment Rights.....	9
B.	The Court Should Reject Defendant’s Request for a Venue Change Because Trying the Case in Palm Springs Will Not Prejudice the District.....	10
1.	The Coachella Valley’s Population is Sufficient to Impanel an Impartial Jury.....	11
2.	The Minimal Press Coverage Has Not Tainted the Jury Pool.	12
3.	A Transfer Would Prejudice Plaintiff’s (and the Public’s) Interest in Trying the Case in the Court where the Case was Filed.	13
IV.	CONCLUSION	13

TABLE OF AUTHORITIES

CASES

Aikens v. Wisconsin

(1904) 195 U.S. 194 9

CBS, Inc. v. Davis

(1994) 510 U.S. 1315 5

Conservatorship of Becerra

(2009) 175 Cal.App.4th 1474 3

DVD Copy Control Assoc., Inc. v. Bunner

(2003) 31 Cal.4th 864 10

Evans v. Evans

(2008) 162 Cal.App.4th 1157 7, 10

Freedom Comm'ns, Inc. v. Sup. Ct.

(2008) 167 Cal. App. 4th 150 5, 10

Hurvitz v. Hoefflin

(2000) 84 Cal.App.4th 1232 1, 4, 5, 6

In re Tsarnaev

(1st Cir. 2015) 780 F.3d 14 2

Levine v. District Court

(9th Cir. 1985) 764 F.2d 590 8

Maggi v. Sup. Ct.

(2004) 119 Cal.App.4th 1218 4

Metropolitan Opera Ass'n, Inc. v. Local 100

(2d Cir. 2001) 239 F.3d 172 7

NBC Subsidiary (KNBC-TV), Inc. v. Sup. Ct.

(1999) 20 Cal.4th 1178 9

Near v. State of Minnesota

(1931) 283 U.S. 697 5, 10

Nebraska Press Assoc. v. Stuart

(1976) 427 U.S. 539 4, 9

New York Times Co. v. U.S.

(1971) 403 U.S. 713 5

Nguyen v. Sup. Ct.

(1996) 49 Cal.App.4th 1781 11

1	<i>Odle v. Sup. Ct.</i>	
2	(1982) 32 Cal.3d 932.....	11, 12
3	<i>People v. Ocean Shore R.R., Inc.</i>	
4	(1938) 24 Cal.App.2d 420.....	11
5	<i>Ross v. Kalin</i>	
6	(1921) 53 Cal.App. 616.....	11, 12, 13
7	<i>Smith v. Goguen</i>	
8	(1974) 415 U.S. 566	8
9	<i>Steiner v. Sup. Ct.</i>	
10	(2013) 220 Cal.App.4 th 1479.....	1, 4, 8, 9
11	<i>Sun Co. of San Bernardino v. Sup. Ct.</i>	
12	(1973) 29 Cal.App.3d 815.....	4
13	<i>Thompson v. W. States Med. Ctr.</i>	
14	(2002) 535 U.S. 357	1
15	<i>Union Trust Life Ins. Co. v. Sup. Ct.</i>	
16	(1968) 259 Cal.App.2d 23.....	11
17	<i>United States v. Moussaoui</i>	
18	(4th Cir. 2002) 43 F.App'x 612	2
19	<i>United States v. Yousef</i>	
20	(2d Cir. 2003) 327 F.3d 56.....	2
21	<i>Younger v. Smith</i>	
22	(1973) 30 Cal.App.3d 138.....	4

STATUTES

23	California Code of Civil Procedure § 397.....	10
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1 **I. INTRODUCTION.**

2 This is a whistleblower retaliation case. Plaintiff John Villani (“Villani” or
3 “Plaintiff”) alleges that Defendant Palm Springs Unified School District
4 (“Defendant” or “District”) discharged him for reporting to management that David
5 Yoder (“Yoder”), a long-term and well-respected teacher’s aide, was displaying
6 signs of being a sexual predator of young boys. The District fired Villani in an
7 effort to muzzle his reporting, and now tries to muzzle him again, this time asking
8 for a gag order covering both him and his legal counsel.

9 There is one unsurmountable defect in the District’s Motion: it seeks an
10 unconstitutional prior restraint. The District, which no doubt teaches its students
11 about the formation of our Constitution, should be well aware that “[t]he right to free
12 speech is, of course, one of the cornerstones of our society.” (*Hurvitz v. Hoefflin*
13 (2000) 84 Cal.App.4th 1232, 1241.) And, “[i]f the First Amendment means
14 anything, it means that regulating speech must be a last – not first – resort.” (*Steiner*
15 *v. Sup. Ct.* (2013) 220 Cal.App.4th 1479, 1490, *as modified on denial of reh’g*
16 [quoting *Thompson v. W. States Med. Ctr.* (2002) 535 U.S. 357, 373].) Gag orders
17 are highly disfavored under the law, and Defendant’s proposed restraint cannot
18 withstand strict scrutiny.

19 Presumably recognizing the unlikelihood of obtaining a gag order, the
20 District also requests the Court to issue an order that the case be tried outside its
21 home court in Palm Springs because Plaintiff’s counsel issued one press release in
22 the 14 months since the first trial. (*See* Declaration of Erin M. Kelly [“Kelly Decl.”]
23 ¶ 6.) This, too, is a baseless request, and courts routinely reject similar venue
24 requests under far more serious circumstances. Motions for transfer were rejected in
25 trials over the Boston Bombing, 1993 World Trade Center Bombing, and September
26
27
28

1 11th Pentagon Attack trials.¹ Surely the District cannot think that a single story in a
2 local newspaper exceeds the magnitude of press coverage in those cases so as to
3 make a fair trial impossible in Palm Springs.

4 Because the District fails to show any actual (let alone potential) prejudice,
5 the Court should summarily deny Defendant's request for a gag order and venue
6 transfer.

7 **II. BACKGROUND.**

8 On November 29, 2016, Plaintiff filed this wrongful termination case, alleging
9 Defendant discharged him in retaliation for reporting concerns that Yoder, an
10 elementary school teacher's aide with several years of experience in the District, was
11 displaying the warning signs of being a sexual predator. After the District
12 terminated Villani's employment, Yoder was arrested and ultimately convicted of
13 certain sexual crimes. (Kelly Decl. ¶ 3.)

14 Villani's case went to trial in June 2018, about 2 years after Yoder's
15 conviction. On July 2, 2018, the jury returned an 8-question special verdict form.
16 The verdict form showed that the jury found for Plaintiff on the first 5 questions
17 (including that Villani had engaged in protected whistleblowing [Q. 4] and that his
18 whistleblowing was a contributing factor in the District's decision to non-reelect him
19 [Q. 5]). The verdict form showed that the jury voted against Villani on Question 6:
20 whether his discharge was a substantial factor in causing him harm. Because the
21 jury voted "No" on Question 6, it never addressed Questions 7 and 8. (Kelly Decl.
22 ¶ 4.)

23 The jury was polled, and only 4 jurors indicated they voted against Plaintiff
24 on Question 6. Nevertheless, the Court entered judgment in favor of Defendant and
25 dismissed the jury, after which Plaintiff objected that this was really a mistrial, and
26

27 ¹ See *In re Tsarnaev* (1st Cir. 2015) 780 F.3d 14; *United States v. Yousef*
28 (2d Cir. 2003) 327 F.3d 56; *United States v. Moussaoui* (4th Cir. 2002) 43 F.App'x
612.

1 filed a series of post-trial motions. Ultimately, the Court granted Plaintiff's Motion
2 for a New Trial, which is why we are back before the Court to try this case again.
3 (Kelly Decl. ¶ 5.)

4 Following entry of the Court's New Trial Order, on April 22, 2019, Plaintiff's
5 counsel issued a press release by email to the Desert Sun, Palm Springs' local
6 newspaper, announcing the new trial decision. (See Exhibit A to Declaration of
7 Catherine A. Gayer ["Gayer Decl."].) The press release tracks the Complaint, the
8 evidence presented at the trial, and the Court's Order granting a new trial.² (Kelly
9 Decl. ¶ 6.) We are aware of only one news article, published by the Desert Sun on
10 May 8, 2019, reporting on the Court's order for a new trial. (Kelly Decl. ¶ 7.)

11 Based on this single article, Defendant now claims that Plaintiff and Plaintiff
12 counsel's speech, particularly in the press release, make it impossible for Defendant
13 to get a fair trial in Palm Springs, and that they should be barred from speaking
14 publicly about this case.

15 **III. LEGAL ARGUMENT.**

16 Defendant's Motion raises two questions: first, whether the District's
17 unverified fear of a biased jury pool justifies a gag order in violation of Plaintiff and
18 Plaintiff counsel's First Amendment rights; and second whether one news article
19 following the Court's granting a new trial justifies removing this case from the Palm
20 Springs Courthouse. We address each issue in turn.

21
22 ² Throughout its Motion, Defendant claims Plaintiff counsel makes inaccurate
23 statements about the case in the press release, an accusation we deny. Defendant
24 even invokes former California Rule of Professional Conduct 5-120(a) (abrogated by
25 Rule 3-6, effective November 1, 2018) unjustifiably implying that Plaintiff counsel's
26 press release violates the rules of ethics. (Motion, p. 6:8-7:6.) While we highly
27 dispute the insinuation, this Court is not the proper venue for litigating this issue and
28 we will not needlessly consume the Court's time with a full discussion. (See
Conservatorship of Becerra (2009) 175 Cal.App.4th 1474, 1483 [recognizing that
trial courts do not have responsibility for enforcing rules of professional
responsibility].)

1 A. **The Court Must Deny Defendant's Request for an Unconstitutional**
2 **Prior Restraint.**

3 The District asks this Court to issue an order “prohibiting Plaintiff and his
4 attorneys from making certain public extrajudicial statements including, but not
5 limited to, issuing press releases, initiating contact with the media, posting public
6 social media commentary on the case, and making prejudicial, inflammatory
7 comments to the media.” (Motion, p. 4:20-23.) “Orders which restrict or preclude a
8 citizen from speaking in advance are known as ‘prior restraints,’ and are disfavored
9 and presumptively invalid. An order restricting the speech of trial participants,
10 typically known as a ‘gag order,’ is a prior restraint.” (*Steiner*, 220 Cal.App.4th at
11 1486 [quoting *Hurvitz*, 84 Cal.App.4th at 1241; and citing *Nebraska Press Assoc. v.*
12 *Stuart* (1976) 427 U.S. 539, 559].)

13 California courts subject gag orders in civil cases to strict scrutiny. (*Steiner*,
14 220 Cal.App.4th at 1487.) Accordingly, a gag order on Plaintiff and Plaintiff
15 counsel’s speech is presumptively unconstitutional, “unless (1) the speech sought to
16 be restrained poses a clear and present danger or serious and imminent threat to a
17 protected competing interest; (2) the order is narrowly tailored to protect that
18 interest; and (3) no less restrictive alternatives are available.” (*Id.* [citing *Hurvitz*, 84
19 Cal.App.4th at 1241; and *Maggi v. Superior Court* (2004) 119 Cal.App.4th 1218,
20 1225].)³ Here, the District cannot satisfy any of these three elements.

21
22 ³ Defendant claims, “California courts have applied two different tests in
23 determining the validity of a pre-trial publicity order that acts as a prior restraint,”
24 citing *Sun Co. of San Bernardino v. Superior Court* (1973) 29 Cal.App.3d 815 and
25 *Younger v. Smith* (1973) 30 Cal.App.3d 138 for one standard (lower than strict
26 scrutiny) and *Steiner* for the standard above. (*See* Motion p. 5:19-27.) Both *Sun Co.*
27 and *Younger* are criminal cases, in which extrajudicial statements involve much
28 graver constitutional risks. We are aware of no civil cases invoking the *Sun Co.* or
Younger standards. Thus, the strict scrutiny standard described in *Steiner* is the
proper test here.

1 1. **The Speech Poses No Clear and Present Danger or Serious**
2 **and Imminent Threat to a Fair Trial.**

3 A prior restraint is a “most extraordinary remedy” reserved only for
4 “exceptional cases . . . where the evil that would result from the [speech] is both
5 great and certain and cannot be militated by less intrusive measures.” (*Freedom*
6 *Comm’ns, Inc. v. Sup. Ct.* (2008) 167 Cal.App.4th 150, 153, *as modified* [quoting
7 *CBS, Inc. v. Davis* (1994) 510 U.S. 1315, 1317 (Blackmun, J., in chambers)]; *id.*
8 [“The United States Supreme Court has offered two examples of the sort of
9 ‘exceptional’ situations in which a prior restraint might be justified: to prevent the
10 dissemination of information about troop movements during wartime (*Near v. State*
11 *of Minnesota* (1931) 283 U.S. 697) or to ‘suppress [] information that would set in
12 motion a nuclear holocaust.’” (*New York Times Co. v. U.S.* (1971) 403 U.S. 713
13 (Brennan, J., concurring))].) Defendant claims that Plaintiff counsel’s press release
14 – which resulted in only one news article published nearly 4 months before the
15 second trial date – presents a clear and present danger to the right to a fair trial. But
16 the risk that some jurors may have read a news article about the case in early May
17 2019 does not present an “imminent threat” worthy of the “most extraordinary
18 remedy.” (*Id.*)

19 The mere potential that speech could prejudice a jury pool does not justify a
20 prior restraint. The court in *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232 rejected
21 this reasoning outright. In the course of litigation, the parties identified celebrity and
22 non-celebrity medical patients in their filings, garnering media attention to the case.
23 (*Id.* at 1235-37.) The trial court issued a gag order to protect the patients’ privacy
24 and to prevent prejudicing potential jurors. (*Id.* at 1237-40.) The court of appeal
25 reversed. In addressing whether the speech constituted an imminent threat to an
26 impartial jury, the court held:

1 **“I. The Mere Possibility of Prejudice to Potential Jurors Does**
2 **Not Justify the Prior Restraint.**

3 The trial court based its order in part on its finding
4 ‘needless dissemination of this privileged information . . . might
5 prejudice potential jurors.’ This does not constitute a finding
6 [sic] a risk of prejudice actually exists, and indeed there is no
7 evidence in the record to support such a finding. Where a party
8 contends his or her right to a fair trial has been or will be
9 compromised by pretrial publicity, the law has long imposed on
10 that party the burden of producing evidence to establish
11 prejudice. ‘[I]t is not enough for a court to decide that the fair
12 trial right *may* be affected by the exercise of free speech.’ Here,
13 the trial court’s ruling relies on just such speculation. This is not
14 enough to support the prior restraint on speech.”

15 *Hurvitz*, 84 Cal.App.4th at 1242 [citations and footnotes omitted; emphasis in
16 original].) Similarly here, Defendant only speculates that future statements to the
17 public could impede the Court’s ability to seat an impartial jury. (*See* Motion, p.
18 4:15-17 [“Defendant has **good reason to believe** it would not receive a fair trial
19 from an impartial jury should Plaintiff’s extrajudicial statements to the public and
20 the media continue.” Emphasis added.]) The District does not tell us what these
21 “good reasons” are, and it offers no evidence, just a non-evidentiary, conclusory
22 declaration from its counsel to support its hunch. (*See* Gayer Decl., ¶ 6.)

23 Defendant cannot show that Plaintiff’s speech causes a threat because none
24 exists. The District points to statements in the press release about procedural errors
25 following the improper verdict in the first trial, claiming “an average person is not
26 likely to understand the polling issue that occurred at the first trial.” (Motion, p. 7:4-
27 5.) Using Defendant’s own reasoning, the speech cannot taint a jury pool that will
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1 not even understand the complex legal issues addressed in the post-trial motions.
2 Confusion over whether the first trial ended with 4 or 6 jurors voting in favor of the
3 District – to the extent any confusion exists – does not deprive Defendant of a fair
4 trial.⁴

5 Even if Defendant had offered evidence of a threat – and it did not –
6 Defendant fails to produce evidence that a threat is imminent. The District waited
7 nearly 3 months from issuance of the press release to file this Motion. Defense
8 counsel never contacted Plaintiff counsel to discuss the contents of the press release,
9 their concerns with alleged inaccuracies, or whether we intended to continue
10 speaking with the press about the case. (Kelly Decl. ¶ 8.) Instead, the District
11 waited for a motion hearing approximately 3 weeks before trial to urgently prevent
12 “imminent” future communications with the public. The District even
13 acknowledges that Plaintiff counsel issued a press release **nearly 3 years ago** after
14 filing the Complaint, but Defendant did not pursue a gag order then. (Kelly Decl.
15 ¶ 6.) The delay speaks for itself.

16 Defendant also accuses Plaintiff counsel’s press release of leeching onto the
17 media attention given to the David Yoder case in order to “sensationalize” Plaintiff’s
18 claims. (Motion, p. 6:1-2.) Not true. David Yoder was convicted of child sex
19 crimes in February 2016, over three and a half years before this case is set for its
20 second trial. In fact, the Yoder case was fresher on the minds of potential jurors
21

22
23 ⁴ The District emphasizes throughout its Motion its concern that statements in
24 the press release are “false” or “misleading.” (See, e.g., Motion, p. 6:27-28.) We
25 vehemently deny this accusation. But even raising this point shows Defendant’s
26 lack of understanding of First Amendment jurisprudence, which disfavors prior
27 restraints, even over false or misleading speech. (See *Evans v. Evans* (2008) 162
28 Cal.App.4th 1157, 1167-68 [citing *Metropolitan Opera Ass’n, Inc. v. Local 100* (2d
Cir. 2001) 239 F.3d 172, 176, holding that “[w]hile [a party] may be held
responsible for abusing his right to speak freely in a subsequent tort action, he has
the initial right to speak freely without censorship”].)

1 prior to the previous trial in June 2018 and, yet, the District raised no speech
2 concerns then. It is plain to see: Defendant has no real concern of a clear and
3 present danger.

4 2. **Defendant’s Blanket Request to Prevent “Prejudicial,**
5 **Inflammatory Statements” to the Public and the Press is**
6 **Unconstitutionally Vague and Overbroad.**

7 The restraint is not narrowly tailored. First, it is vague. “A restraining order
8 is unconstitutionally vague if it fails to give clear guidance regarding the types of
9 speech for which an individual may be punished.” (*Levine v. District Court* (9th Cir.
10 1985) 764 F.2d 590, 599 [citing *Smith v. Goguen* (1974) 415 U.S. 566, 572-73].)
11 The District’s Motion requests a prior restraint on “prejudicial, inflammatory
12 statements” about the case to the media. (Motion, p. 7:9-11.) From Defendant’s
13 perspective, practically any statement Plaintiff or his legal counsel could make about
14 the case would be prejudicial to the District. There are no objective definitions of
15 the terms “prejudicial” or “inflammatory,” particularly in the context of a litigation.
16 This gag order “fails to give clear guidance” for permissible speech. (*Id.*)

17 Second, the District’s gag order is unconstitutionally overbroad. Despite its
18 indiscriminate request to prevent Plaintiff and Plaintiff counsel from speaking about
19 the case with the media and the public, Defendant claims its gag order is narrowly
20 tailored because it would not apply to the media itself. (Motion, p. 6:5-6.) This
21 misses the point. Under strict scrutiny review, the Court reviews whether the prior
22 restraint is tailored to promote only the interest of a fair trial – not whether it
23 impedes the free speech rights of other speakers. (*See Steiner*, 220 Cal.App.4th at
24 1489-90 [holding a court must look to whether restraint is more extensive than
25 necessary to serve compelling interest].) In this case, the District proposes no
26 tailoring at all.

1 3. **There Are Plenty of Less Restrictive Means of Protecting the**
2 **Right to a Fair Trial That Do Not Impede on First**
3 **Amendment Rights.**

4 The District's Motion blows right past the potential for less restrictive means
5 of securing a fair trial, likely because plenty of adequate (and constitutional)
6 alternatives exist. It bears emphasis that only one news article has been published
7 since the Court granted a new trial, so the likelihood that the jury pool is even aware
8 of this case is slim. Nevertheless, assuming *arguendo* that potential jurors are
9 familiar with Plaintiff's claims, Defendant's concerns of prejudice are cured through
10 procedural safeguards like voir dire and jury instruction. In *Nebraska Press*
11 *Association v. Stuart*, the Supreme Court recognized that "searching questioning of
12 prospective jurors . . . to screen out those with fixed opinions as to guilt or
13 innocence" is an appropriate alternative to a prior restraint. (427 U.S. at 564.)
14 Moreover, "[i]t is well established that 'frequent and specific cautionary
15 admonitions and jury instructions . . . constitute the accepted, presumptively
16 adequate, and plainly less restrictive means of dealing with the threat of jury
17 contamination.'" (*Steiner*, 220 Cal.App.4th at 1490 [quoting *NBC Subsidiary*
18 (*KNBC-TV*), *Inc. v. Sup. Ct.* (1999) 20 Cal.4th 1178, 1221].)

19 The District's failure to even consider these less restrictive means mocks our
20 jury trial system in which we rely on jurors' abilities to make sound and independent
21 decisions. "To paraphrase Justice Holmes, it must be assumed that a jury does its
22 duty, abides by cautionary instructions, and finds facts only because those facts are
23 proved." (*Steiner*, 220 Cal.App.4th at 1490 [quoting *NBC Subsidiary*, 20 Cal.4th at
24 1223-24; and citing *Aikens v. Wisconsin* (1904) 195 U.S. 194, 206]; *see also id.* at
25 1491-92 [recognizing that the dozens of law review and legal news articles cited by
26 the parties all "stop short of suggesting that prior restraints of out-of-courtroom
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1 speech are the answer” because “[t]he focus is on controlling jurors’ behavior, not
2 that of the trial participants”].)

3 A prior restraint is “the most serious and least tolerable infringement on First
4 Amendment rights.” (*Evans*, 162 Cal.App.4th at 1166-67 [quoting *DVD Copy*
5 *Control Assoc., Inc. v. Bunner* (2003) 31 Cal.4th 864, 886; *Near*, 283 U.S. at 713].)
6 Gag orders are highly unusual in civil cases, and appropriate only in the most
7 “exceptional” situations. (*Freedom Comm’ns, Inc.*, 167 Cal.App.4th at 153.) This is
8 not that case. Defendant does not meet its burden to show that Plaintiff and his legal
9 counsel’s speech caused any threat, let alone an imminent one, to securing a fair
10 trial. And to the extent any actual concern exists, the Court has adequate alternative
11 means of ensuring an impartial jury is impaneled.

12 We agree with Defendant on one issue: Plaintiff’s case deals with sensitive
13 issues which involve David Yoder, Defendant’s employee who engaged in horrific
14 child sex crimes, and Plaintiff, the teacher who reported him. Plaintiff claims the
15 District stifled his reporting by terminating his employment. Now the District is
16 trying to stifle his speech again. The Court should reject Defendant’s efforts to
17 suppress Plaintiff and his counsel’s First Amendment rights, as the public has a
18 strong interest in knowing about this case.

19 **B. The Court Should Reject Defendant’s Request for a Venue Change**
20 **Because Trying the Case in Palm Springs Will Not Prejudice the**
21 **District.**

22 In addition, or in the alternative, to a gag order, Defendant requests the Court
23 order the case to be tried in the Riverside Main Courthouse or in the Southwest
24 Justice Center in Murrieta, and not in the Palm Springs Courthouse where it was
25 filed. California Code of Civil Procedure § 397(b) provides a court may change the
26 place of trial “[w]hen there is reason to believe that an impartial trial cannot be had
27 therein.” “The right of [a party] to have their case tried in the county wherein they
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1 and their witnesses reside is a substantial one, and is not to be set aside unless it
2 actually conflicts with the higher right of a [the other party] to have an impartial
3 trial.” (*Ross v. Kalin* (1921) 53 Cal.App. 616, 619.)

4 To justify the transfer of venue, a party must prove it will suffer “actual
5 prejudice” and not prejudice based on “suspicion, conjecture, or hearsay.” (*Id.*; *see*
6 *also Nguyen v. Sup. Ct.* (1996) 49 Cal.App.4th 1781, 1791 [citing *Union Trust Life*
7 *Ins. Co. v. Sup. Ct.* (1968) 259 Cal.App.2d 23].) In *Nguyen v. Superior Court*, the
8 trial court did not abuse its discretion in finding insufficient evidence of a
9 “widespread feeling of prejudice extending over a long time” where the moving
10 party submitted two newspaper articles reporting on the crimes and a declaration by
11 an employee of the moving party’s counsel stating the police interviewed the public
12 about the case. (*Id.* [citing *People v. Ocean Shore R.R., Inc.* (1938) 24 Cal.App.2d
13 420].)

14 Courts consider the size of the community in which the case was filed as well
15 as the nature and extent of publicity in determining whether trying the case in the
16 home courthouse would cause “actual prejudice.” (*Odle v. Sup. Ct.* (1982) 32 Cal.3d
17 932, 938-39.)

18 1. **The Coachella Valley’s Population is Sufficient to Impanel an**
19 **Impartial Jury.**

20 The Gayer Declaration claims the Coachella Valley population is
21 approximately 450,000 without providing any indication where this number comes
22 from. (Gayer Decl., ¶ 6.) Regardless, the Declaration states the community is
23 “tight-knit” and “comprised of individuals who closely follow the local news.” (*Id.*)
24 Yet, Defendant provides **no evidence** to support these claims, not even circulation
25 figures for the Desert Sun. Moreover, in a community of 450,000 people, the Court
26 will have little difficulty impaneling a jury of 12 individuals who have an unbiased
27 perspective of this case. Defendant fails to meet its burden to show the size of the
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1 community would prevent it from an impartial trial. (*See Odle*, 32 Cal.3d at 938
2 [finding community size of approximately 666,000 weighed in favor of denying
3 transfer motion despite extensive media coverage of police officer murder trial];
4 *Ross*, 53 Cal.App at 619 [evidence that approximately 300 people who potentially
5 bore prejudice against the plaintiff in a jurisdiction of as many as 12,000 jurors not
6 sufficient to show “widespread prejudice” justifying transfer].)

7 **2. The Minimal Press Coverage Has Not Tainted the Jury Pool.**

8 This case has received only nominal media coverage since its filing in late
9 2016, with only one news article we are aware of over the last two years. (Kelly
10 Decl. ¶ 7.) Nevertheless, Defendant claims this somehow warrants the extraordinary
11 remedy of an order moving the trial out of Palm Springs. California courts set a
12 high bar for such a request. For example, *Odle v. Superior Court* involved a highly
13 publicized trial over the murder of a police officer and a young woman which
14 garnered television coverage of a manhunt, county newspaper coverage of pretrial
15 proceedings and developments up to and including the requests for change of venue,
16 as well as paper coverage of the funeral of the slain officer. (*Odle*, 32 Cal.3d at
17 939.) The criminal defendant submitted over 150 news articles on the case in
18 support of his motion. But the California Supreme Court still affirmed denial of the
19 transfer because the news reporting was not “inflammatory, sensational, or hostile.”
20 (*Id.*) The circumstances in this case do not even come close to the situation in *Odle*,
21 and the minimal press coverage cannot be said to be “inflammatory, sensation, or
22 hostile.”

23 Defendant tries to tack its concerns about impaneling an impartial jury in
24 Palm Springs to the “extensive” media coverage on David Yoder. But, again,
25 Defendants fail to point to any specific evidence of this “extensive” coverage or that
26 the alleged coverage actually prejudiced the jury pool in Plaintiff’s wrongful
27 termination case.

1 3. **A Transfer Would Prejudice Plaintiff's (and the Public's)**
2 **Interest in Trying the Case in the Court where the Case was**
3 **Filed.**

4 Plaintiff has a "substantial" right to have his case tried where his witnesses
5 reside. (*Ross*, 53 Cal.App. at 619.) An order requiring the case be tried outside of
6 Palm Springs, where the case was filed, limits Plaintiff's access to his witnesses and
7 the public's access to the trial. All of the events relevant to Plaintiff's case occurred
8 in Palm Springs and, given the sensitive nature of Plaintiff's claims, the public has a
9 strong interest in the trial proceedings. Just as with Defendant's request for a gag
10 order, any doubt as to the impartiality of potential jurors can be cured through voir
11 dire and jury instruction. Plaintiff must be permitted to try his case in Palm Springs,
12 should the Court's Master Calendar allow.

13 **IV. CONCLUSION**

14 For the foregoing reasons, Plaintiff respectfully requests the Court deny
15 Defendant's motion for a gag order in violation of Plaintiff and Plaintiff counsel's
16 First Amendment rights and deny its motion that the case be tried in Riverside or
17 Murrieta.

18
19
20 DATED: August 2, 2019

Respectfully submitted,
LAW OFFICES OF STEVEN J. KAPLAN PC

21 
22 Erin M. Kelly

23 *Attorneys for Plaintiff John Villani*
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1 **DECLARATION OF ERIN M. KELLY**

2 I, Erin M. Kelly, say and declare as follows:

3 1. **Introduction.** I am an attorney at law duly licensed to practice before
4 all courts of the State of California. I am an associate of the Law Offices of Steven
5 J. Kaplan, A Professional Corporation. I am counsel of record for Plaintiff John
6 Villani ("Plaintiff"). Except where expressly qualified, I have personal knowledge
7 of the facts testified to herein, and if called upon to do so I could and would
8 competently and truthfully testify thereto.

9 2. **Purpose of Declaration.** This Declaration is submitted in support of
10 Plaintiff's Opposition to Defendant Palm Springs Unified School District's
11 ("Defendant" or "District") Motion for Pre-trial Publicity Order Prohibiting Plaintiff
12 and Plaintiff's Counsel from Making Public Extrajudicial Statements Regarding the
13 Case and/or Order That the Case be Tried Elsewhere in Riverside County.

14 3. **Procedural and Factual Background.** The procedural and factual
15 summary of this case stated on pages 2 through 3 of Plaintiff's Opposition are based
16 on information learned in the course of this litigation and are true and accurate to the
17 best of my knowledge.

18 4. This case first went to trial in June 2018. On July 2, 2018, the jury
19 returned an 8-question special verdict form. The verdict form showed that the jury
20 found for Plaintiff on the first five questions (including that Plaintiff had engaged in
21 protected whistleblowing [Q. 4] and that his whistleblowing was a contributing
22 factor in the District's decision to non-reelect him [Q. 5]). The verdict form showed
23 that the jury voted against Plaintiff on Question 6: whether his discharge was a
24 substantial factor in causing him harm. Because the jury voted "No" on Question 6,
25 it never addressed Questions 7 and 8.

26 5. The Court polled the jury, and only 4 jurors indicated they voted
27 against Plaintiff on Question 6. Nevertheless, the Court entered judgment in favor
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1 of Defendant and dismissed the jury, after which we objected that this was really a
2 mistrial, and filed a series of post-trial motions. Ultimately, the Court granted
3 Plaintiff's Motion for a New Trial on March 7, 2019.

4 6. **Plaintiff's Press Releases.** Our law firm has issued two press releases
5 in the course of this litigation: one press release following the filing of the complaint
6 in 2016 and one press release following the Court's New Trial Order on April 22,
7 2019. My colleague, Steven J. Kaplan, issued the second press release by email to
8 the Desert Sun, Palm Springs' local newspaper, announcing the new trial decision.
9 The press release tracks the Complaint, the evidence presented at the trial, and the
10 Court's Order granting a new trial.

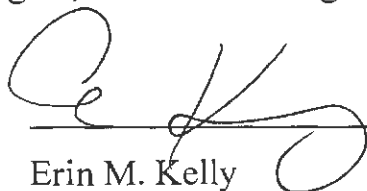
11 7. **Press Coverage.** This case has received minimal press coverage. The
12 Desert Sun published an article shortly after we filed this case in 2016. I am aware
13 of only one news article, published by the Desert Sun on May 8, 2019, reporting on
14 the Court's order for a new trial.

15 8. **No Contact from Defense Counsel about Press Release.** To my
16 knowledge, Defendant's legal counsel has not contacted anyone at our law firm to
17 discuss Mr. Kaplan's April 2019 press release.

18 I declare under penalty of perjury under the laws of the State of California that
19 the foregoing is true and correct.

20 Executed on this 2nd day of August, 2019 at Los Angeles, California.

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Erin M. Kelly

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

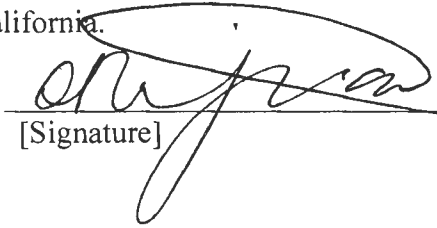
I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is 1880 Century Park East, Suite 614, Los Angeles, California 90067. On August 2, 2019, I served the foregoing document described as **OPPOSITION TO DEFENDANT'S MOTION FOR PRE-TRIAL PUBLICITY ORDER PROHIBITING PLAINTIFF AND PLAINTIFF'S COUNSEL FROM MAKING PUBLIC EXTRAJUDICIAL STATEMENTS REGARDING THE CASE AND/OR ORDER THAT THE CASE BE TRIED ELSEWHERE IN RIVERSIDE COUNTY AND DECLARATION OF ERIN M. KELLY IN SUPPORT THEREOF** on the interested parties in this action:

SEE ATTACHED SERVICE LIST

- ☐ **BY U.S. POSTAL SERVICE:** This document was served by United States mail. I enclosed the document in a sealed envelope or package addressed to the person(s) at the address(es) above and placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Los Angeles, California, in a sealed envelope with postage fully paid.
- ☐ **BY FACSIMILE:** The document(s) were served by facsimile. The facsimile transmission was without error and completed prior to 5:00 p.m. A copy of the transmission report is available upon request.
- ☒ **BY OVERNIGHT DELIVERY:** The document(s) were served by overnight delivery via FedEx. I enclosed the document in a sealed envelope or package addressed to the person(s) and the address(es) above and placed the envelope(s) for pick-up by FedEx. I am readily familiar with the firm's practice of collection and processing correspondence on the same day with this courier service, for overnight delivery.
- ☐ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- ☐ **BY HAND DELIVERY:** I caused the document(s) to be delivered by hand during the normal course of business, during regular business hours.
- ☒ (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 2, 2019, at Los Angeles, California.

Ohndrea Najera


[Signature]

SERVICE LIST

Catherine A. Gayer
Winet Patrick Gayer Creighton & Hanes
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Palm Springs, CA 92262